

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 34

MOLLEUR ELEVATOR COMPANY, INC.

Employer <sup>1</sup>

and

JOSEPH BAYUSIK, AN INDIVIDUAL

Petitioner

and

INTERNATIONAL UNION OF  
ELEVATOR CONSTRUCTORS

Union

Case No. 34-RD-252

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.

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The Employer's name appears as amended at the hearing.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons.

The Employer, a Connecticut corporation with its office and principal place of business located in Wallingford, Connecticut, installs, maintains, and repairs elevators in residential and commercial buildings. The Petitioner seeks to decertify the Union which represents a unit consisting of one elevator constructor mechanic and two elevator constructor helpers. The Union contends that the instant petition is barred by the existence of a collective-bargaining agreement which was automatically renewed prior to the filing of the petition. The Employer contends that the agreement cannot serve as a bar because automatic renewal had been forestalled by the Employer's timely notification that it wished to terminate the agreement, and that even if renewed, it was negotiated pursuant to Section 8(f).

It is undisputed that the Employer has had a collective-bargaining relationship with the Union since at least 1985, at which time the Employer signed an agreement which bound it to the terms of the Standard Agreement between the National Elevator Industry, Inc. (NEII) and the Union. It is also undisputed that on July 10, 1987, the Employer signed a "Voluntary Recognition Agreement" with the Union stating, inter alia, that "[t]he Employer did receive and examine authorization cards voluntarily executed by employees of the Employer and the Employer acknowledges and agrees that a majority of its Elevator Constructor Mechanics and Elevator Constructor Helpers . . . have authorized the Union to represent them in collective bargaining."

Contemporaneous with the signing of the Voluntary Recognition Agreement, the Employer signed an agreement again binding it to the Standard Agreement between NEII and the Union for the period July 9, 1987 to July 8, 1992. Thereafter, on September 30, 1992, the Employer signed another agreement binding it to the Standard Agreement between NEII and the Union for the period July 9, 1992 to July 8, 1997. It is the alleged automatic renewal of the September 30, 1992, agreement which the Union raises as a bar to the instant petition. In this regard, paragraph 11 of the September 30, 1992 agreement contains the following provision:

Should either party fail to give written notice of modification or termination to the other party at least sixty (60) days prior to July 8, 1997, this Agreement and the parties' obligation hereunder to be bound by the terms and conditions of the July 9, 1992 - July 8, 1997 Standard Agreement between the National Elevator Industry, Inc. and the International Union of Elevator Constructors shall continue in force and effect until such time as a successor Standard Agreement is entered into by NEII and the IUEC, at which time the Employer and the Union shall by virtue of this Agreement, bound by the terms and conditions of said successor agreement Standard Agreement for its duration; provided however, that if no successor Standard Agreement is reached, the obligation to continue to be bound to the terms of this Agreement and the July 9, 1992 - July 8, 1997 Standard Agreement shall cease on July 8, 1999.

According to the Employer's President, Michael Molleur, he sent a letter dated April 1, 1997 by regular mail to the Union's Business Manager, Dominic Accarpio, and that he never received the letter back in the mail. Although a copy of the letter was received into evidence, no other evidence was proffered by the Employer regarding the preparation of the letter, the addressing of the envelope, the business routine of the office regarding the mailing of letters, or its actual placement in the mail. The letter states as follows:

Re: Standard Agreement (Notice of Termination)

\* \* \*

In accordance with the terms and conditions as outlined in the standard agreement this letter shall serve as notice that Molleur Elevator Co., Inc. will not be signing the standard agreement or voluntary recognition agreement. If you should have any questions regarding this matter feel free to contact me.

According to Accarpio, the Union in 1986 ceased occupying the room number set forth in the April 1 letter, and neither he nor the Union ever received that letter. In this regard, it is undisputed that at some point following the expiration of the collective-bargaining agreement on July 8, 1997, the Employer abided by the terms of the new Standard Agreement which went into effect on July 9, 1997. Thus, after the terms of the new Standard Agreement between NEII and the Union were finalized, Accarpio met with Molleur in September 1997 for the purpose of having Molleur sign the new agreement. Molleur told Accarpio he would have his attorney look at the agreement and would get back to him later.

Accarpio never received the signed agreement from Molleur, and they met again some time prior to the Christmas holidays in December 1998. According to Accarpio, Moelleur told him during that meeting that although he didn't have a problem signing the agreement, his employees didn't want him to sign the agreement, and that he wasn't signatory to the agreement. Accarpio told Molleur that he should read the language in the last collective bargaining agreement, and that Molleur had never sent a letter "60 days prior" to the contract expiration. Although Accarpio acknowledged that Molleur seemed "stunned" and "puzzled", it is undisputed that Molleur did not otherwise respond to Accarpio's statement that the Employer had never terminated the prior agreement. The instant petition was filed on March 15, 1999.

The record clearly establishes that the collective-bargaining relationship between the Employer and the Union matured into a relationship under Section 9(a) when the Employer signed the Voluntary Recognition Agreement on July 10, 1987. *Triple A Fire Protection, Inc.*, 312 NLRB 1088 (1993); *Casale Industries*, 311 NLRB 951 (1993); *Pierson Electric, Inc. d/b/a Golden West Electric*, 307 NLRB 1494 (1992). Thus, there is no merit to the Employer's assertion that the agreement, even if renewed, cannot bar the instant petition because it was negotiated pursuant to Section 8(f).

Accordingly, it must be determined whether the Employer's attempt to terminate the 1992-1997 collective bargaining agreement by its April 1, 1997 letter was sufficient to forestall automatic renewal of that agreement, thereby eliminating it as a bar to the instant petition. It is well established that "where the existence or nonexistence of a contract bar depends upon the giving of a timely notice, the timeliness of such notice depends not upon the date of mailing but upon the date of receipt." *Koenig Brothers, Inc.*, 108 NLRB 304 (1954). In this regard, the Board will consider "mitigating circumstances" in determining the timeliness of a notice to terminate an agreement, *Koenig Brothers, Inc.*, supra, particularly where the notice is delayed by conditions "beyond the control of the sender." *United Electronics Institute of Iowa*, 222 NLRB 814 (1976). However, in the absence of conclusive evidence that a letter was mailed, the usual presumption that a letter placed in the mail has been received will not be applied. *Moving Picture Machine Operators, Local 224*, 238 NLRB 507 (1978); see also *K & S Circuits*, 255 NLRB 1270, 1276 (1981).

Based upon the foregoing and the record as a whole, I find that the Employer did not terminate its agreement with the Union by its April 1, 1997 letter. More particularly, the weight of the evidence supports the Union's claim that it never received that letter. In this regard, the record establishes that the Employer took no other action to communicate its desire to terminate the contract other than sending a letter by regular mail three months before the contract expiration. Indeed, the record is devoid of evidence establishing when or by whom the letter was placed in the mail. Accordingly, to the extent that there is any uncertainty as to whether the letter was received by the Union, the Employer must bear the responsibility. Thus, it could have easily avoided the problem by delivering the letter personally, or by sending the letter by certified mail, private carrier delivery, or facsimile transmission.<sup>2</sup> Therefore, under all of circumstances, I cannot find that the failure of the Union to receive the letter was beyond the Employer's control. The Employer's failure to provide timely notice of termination pursuant to paragraph 11 of its agreement with the Union caused that agreement to be automatically renewed, thereby binding the Employer to the 1997-2002 Standard Agreement between NEIU and the Union. *Moving Picture Machine Operators, Local 224*, supra.

Accordingly, based upon the above and the record as a whole, I find that the 1997-2002 collective bargaining agreement bars an election herein.<sup>3</sup> I shall, therefore, dismiss the instant petition.

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<sup>2</sup> I note further that there is no other evidence supporting Molleur's testimony that he mailed the letter, such as other correspondence or telephone conversations with the Union. To the contrary, when Accarpio presented Molleur in September 1997 with the new agreement for his signature, Molleur did not claim that he had sent a termination notice or that he was otherwise not obligated to sign the agreement. Similarly, during a meeting in about December 1998, Molleur did not respond to Accarpio's statement that the Employer had never terminated the prior agreement by sending the required 60-day notice. See *Camay Drilling Co.*, 239 NLRB 997, fn. 5 (1978).

<sup>3</sup> It is well established that a contract having a fixed term of more than 3 years operates as a bar for as much of its term as does not exceed 3 years. *General Cable Corp.*, 139 NLRB 1123 (1962).

ORDER

IT IS HEREBY ORDERED that the instant petition be, and it hereby is, dismissed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by April 27, 1999.

Dated at Hartford, Connecticut this 13th day of April, 1999.

/s/ Peter B. Hoffman

Peter B. Hoffman, Regional Director  
Region 34  
National Labor Relations Board

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